Supreme Court, U. S.
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NO _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NELSON OIL COMPANY, INC.,

Petitioner,

-vs-

SHELL OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIROARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the Temporary Emergency Court of Appeals erred in sanctioning the District Court's exercise of jurisdiction, in light of the fact that the case had already been remanded to state court, and in violation of 28 U.S.C. §1447(d).

2. Whether the Temporary Emergency Court of Appeals erred in affirming the District Court's failure to defer the substantive issues herein to the primary jurisdiction of the Department of Energy, in light of the failure of the District Court to consider Petitioner's competitive viability as an independent marketer of gasoline, and in light of the Department of Energy's statutory obligation to do so.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO.

NELSON OIL COMPANY, INC.,

Petitioner,

-vs-

SHELL OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS,

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Nelson Oil Company, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals entered in the above-entitled case on July 21, 1980.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. THE TRIAL OF THIS ACTION IN FEDERAL COURT WAS ERROR AND IN EXCESS OF JURISDICTION, BECAUSE A PRIOR DISTRICT COURT HAD REMANDED THE ACTION TO STATE COURT AND, PURSUANT TO 28 U.S.C. §1447(d), SUCH ORDERS ARE FINAL.	7
A. THE PRIOR ORDER OF THE DISTRICT COURT REMANDING THIS ACTION TO STATE COURT WAS RES JUDICATA ON THE QUESTION OF THE PROPER FORUM.	7
B. THE ECONOMIC STABILIZATION ACT DOES NOT PERMIT A CIRCUMVENTION OF 28 U.S.C. §1447(d); DEFENSES BASED	12

Page

UPON THE ACT MAY BE HEARD IN STATE COURT.

C. SHELL HAS IMPROPERLY USED THE REMOVAL PROCEDURE FOR THE PURPOSE OF FRUSTRATING TIMELY ACCESS TO STATE COURT. 16

II. THE DISTRICT COURT AND TECA ERRED IN INTERPRETING AND APPLYING THE CERTIFICATION REGULATION WITHOUT FIRST REFERRING THE ISSUE TO THE DOE, AND IN A MANNER INCOMPATIBLE WITH THE EMERGENCY PETROLEUM ALLOCATION ACT. 20

CONCLUSION 27

TABLE OF AUTHORITIES

Cases	Page
American Fire & Casualty Co. v. Finn, 341 U.S. 6, 95 L.Ed. 702 (1951)	9
Ashland Oil Corp. v. Federal Energy Administration, 389 F.Supp. 1119 (N.D. Cal. 1975)	24
Chandler v. O'Bryan, 445 F.2d 1045 (10th Cir. 1971)	9
Coan v. State of California, 11 Cal.3d 286, 520 P.2d 1003 (1974)	15
Eastern Air Lines, Inc. v. Mobil Oil Corp., 403 F.Supp. 757 (S.D. Fla. 1975)	22
Exxon Corp. v. Federal Energy Administration, 417 F.Supp. 516 (D. N.J. 1975)	24
Far East Conference v. United States, 342 U.S. 570, 96 L.Ed. 576 (1951)	22
Hampton House Management Corp. v. Saleh, 357 F.Supp. 591 (S.D. N.Y. 1973)	13, 14
Missouri Pac. Ry. Co. v. Fitzgerald, 160 U.S. 556, 16 S.Ct. 389, 40 L.Ed. 536 (1896)	8

Cases	Page
Mobil Oil Corp. v. Federal Energy Administration, 566 F.2d 87 (TECA 1977)	24
Morey v. Lockhart, 123 U.S. 56, 31 L.Ed. 68 (1887)	19
Nelson Oil Co. v. Shell Oil Co., Los Angeles Superior Court No. C271545 (currently pending)	25
Orange & Rockland Utilities, Inc. v. Howard Oil Co., 416 F.Supp. 460 (S.D. N.Y. 1976)	22
Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 57 L.Ed.2d 274 (1978)	10
Robertson v. Ball, 534 F.2d 63, (5th Cir. 1976)	11
Shell Oil Co. v. Nelson Oil Co., (TECA No. 9-47, Slip opinion, July 21, 1980)	9, 12, 15, 16, 23
Terrell Oil Corp. v. Atlantic Richfield Co., 468 F.Supp. 860 (E.D. Tenn. 1978)	21, 22
Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 46 L.Ed.2d 542 (1976)	12, 19

Federal Statutes	Page
10 U.S.C. §211.13(f)	2, 3, 20, 26 28
12 U.S.C. §1904 note §210	1, 3, 12
12 U.S.C. §1904 note §211	1, 13
15 U.S.C. §751	2, 20
15 U.S.C. §753(b)(1)(D)	23, 28
15 U.S.C. §754(a)(1)	3, 20
28 U.S.C. §1254(1)	1
28 U.S.C. §1447(d)	2, 4, 7, 8, 10, 11, 12, 16, 17

Miscellaneous	
Department of Energy Notice of Rulemaking Proceeding, 44 Fed. Reg. 69962 (Dec. 5, 1979)	27
Exec. Order 11748, 39 Fed. Reg. 33575 (Dec. 6, 1973)	20
H. R. Rep. No. 93-531, 93d Cong., 1st Sess. (1973); reprinted in [1973] U.S. Code Cong. & Admin. News 2582	24

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals is unreported and is reproduced in Appendix A.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on July 21, 1980. The Petition for Rehearing was denied on September 9, 1980. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations should be considered in determining the issues herein, the pertinent texts of which are reproduced in the Appendix:

1. The Economic Stabilization Act of 1970, 12 U.S.C. §1904, note §§210, 211;

2. The Emergency Petroleum

Allocation Act of 1973, 15 U.S.C. §751 et seq. (Appendix H);

3. 28 U.S.C. §1447(d) (Appendix I);

4. 10 C.F.R. §211.13(f) (Appendix J).

STATEMENT OF THE CASE

Nelson is a Shell-branded independent marketer, or "jobber", and franchisee of Shell, an integrated refiner and distributor of petroleum products. Nelson filed a complaint against Shell in California state court, on September 22, 1978, for unfair competition, fraud and other unfair business practices in connection with Shell's efforts to horizontally control the marketing of Shell gasoline in California. Shell removed the complaint to federal court and filed a counterclaim, asserting jurisdiction pur-

suant to, inter alia, the Economic Stabilization Act of 1970, 12 U.S.C. §1904, note §210 and the Emergency Petroleum Allocation Act of 1973 ["EPAA"], 15 U.S.C. §754(a)(1).

Shell's counterclaim included an allegation that Nelson had violated 10 C.F.R. §211.13(f), which, Shell contended, required Nelson to "downward certify" or reduce the Department of Energy ["DOE"]-ordered allocation that Nelson was entitled to receive from Shell, if Nelson's customers' needs declined. Nelson and the amicus below contested this interpretation. Although requested by Shell, the DOE has never issued any order requiring Nelson to downward certify.

For the sake of clarity, it should be noted in this regard that this Peti-

tion raises only the questions of who is the proper body to determine the meaning and application of the regulation and the manner in which such determination is to be made; this Petition does not seek this Court's determination of the meaning of the regulation.

The District Court (Honorable Robert Firth), on December 27, 1978, remanded the removed complaint, as well as Shell's counterclaim, for adjudication in the state court, pursuant to 28 U.S.C. §1447 (c). (Appendix E).

Rather than proceed in state court, Shell refiled its counterclaim in the District Court (Honorable Manuel Real) as a complaint, on February 20, 1979, alleging the same claims that had appeared in its counterclaim, less one count.

Nelson brought motions to dismiss,

on the grounds that the regulatory issues should be heard by the Department of Energy, and because Judge Firth had already remanded the entire proceedings to state court. Both motions were denied.

The action proceeded to trial. At the conclusion of the trial, the court awarded Shell:

1. Money damages of $617,308.98, representing the profit of 3.02 cents per gallon that Shell would have made if it had sold the gasoline through its dealers instead of through an independent jobber.

2. Immediate reduction of Nelson's DOE allocation from Shell by 17,935,929 gallons annually (approximately 40% of Nelson's gasoline supply), without regard to the new 1977-1978 base period set by DOE regulations.

3. A declaratory judgment that Shell could give notice to Nelson of termination of its franchise (this issue is now pending in the Ninth Circuit Court of Appeals) (Appendices C, D).

Nelson appealed the judgment to the Temporary Emergency Court of Appeals ["TECA"], arguing, inter alia, that the District Court lacked subject matter jurisdiction because Shell's complaint was identical to its prior counterclaim, which had been remanded to state court, and that the regulatory issues should have been deferred to the primary jurisdiction of the DOE. The TECA affirmed the judgment on July 21, 1980 (Appendix A). On September 9, 1980, Nelson's Petition for Rehearing was denied (Appendix B).

REASONS FOR GRANTING THE WRIT

I

THE TRIAL OF THIS ACTION IN FEDERAL COURT WAS ERROR AND IN EXCESS OF JURISDICTION, BECAUSE A PRIOR DISTRICT COURT HAD REMANDED THE ACTION TO STATE COURT AND, PURSUANT TO 28 U.S.C. §1447(d), SUCH ORDERS ARE FINAL.

A. THE PRIOR ORDER OF THE DISTRICT COURT REMANDING THIS ACTION TO STATE COURT WAS RES JUDICATA ON THE QUESTION OF THE PROPER FORUM.

The TECA committed error in affirming the judgment of the District Court, because the District Court had no subject matter jurisdiction. This is so because a different District Court had previously remanded the action, including Shell's counterclaim, to state court, and that order is final and not reviewable.

The statute controlling procedure after removal, 28 U.S.C. §1447(d),

provides:

> "An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise . . . ."

By refiling its remanded counterclaim as a complaint in another District Court, Shell circumvented the provisions and purpose of 28 U.S.C. §1447(d). This court and other courts have long recognized that once an action improperly removed to federal court is remanded to state court, it must remain in state court for adjudication:

> "[S]o far as the question of a forum in which a cause is to be litigated is concerned, the determination of a federal district court that a cause is not removable and remanding it to a state court is final. Missouri Pac. Ry. Co. v. Fitzgerald, 160 U.S. 556, 583, 16 S.Ct. 389, 40 L.Ed. 536 (1896). . . . [The Order to Remand] is

> res judicata as to any further attempts to litigate the same issues in a federal court." Chandler v. O'Bryan, 445 F.2d 1045, 1057 (10th Cir. 1971) (emphasis added).

The TECA itself acknowledged both that Shell's counterclaim had been remanded to state court and that Shell's federal complaint was identical to its remanded counterclaim:

> "The claims stated by Shell in its complaint were originally pleaded in a counterclaim against Nelson in an action charging unfair competition brought by Nelson. Shell removed the case to federal court and thereupon filed its counterclaim. That case was remanded to state court in December, 1978." (TECA No. 9-47, Slip op. at 4, n.1, July 21, 1980) (Appendix A).

The Court has always been wary of improper attempts to invoke federal jurisdiction. In American Fire & Casualty Co. v. Finn, 341 U.S. 6, 95

L.Ed. 702 (1951), this Court stated:

> "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court. . . [would] work a wrongful extension of federal jurisdiction and give federal courts a power the Congress has denied them." Id. at 17-18 (emphasis added) (reversing judgment and ordering remand to state court).

By permitting Shell to refile its remanded counterclaim as a complaint, the District Court and TECA have sanctioned a circumvention of 28 U.S.C. §1447(d) that constitutes error, and requires this Court's attention. As this Court stated in Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374, 57 L.Ed.2d 274 (1978):

> "It is a fundamental precept that federal courts

> are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." (emphasis added) (reversing Court of Appeals).

Since the first District Court had already remanded Shell's counterclaim to state court, there was no basis for its subsequent adjudication as a "complaint" in another federal court. The decisions of this Court and the provisions of 28 U.S.C. §1447(d) require that the action should have remained in state court and that there was no possibility of federal jurisdiction.

The Fifth Circuit has noted:

> "[O]nce the federal district court considers the proper factors and decides to remand, the action should go forward in state court without the further delay of appeal, and without regard to whether the federal district court was correct or incorrect." Robertson

v. Ball, 534 F.2d 63, 66, n.1, (5th Cir. 1976); see Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 343, 46 L.Ed. 2d 542 (1976) (rule well established since 1887).

B. THE ECONOMIC STABILIZATION ACT DOES NOT PERMIT A CIRCUMVENTION OF 28 U.S.C. §1447(d); DEFENSES BASED UPON THE ACT MAY BE HEARD IN STATE COURT.

Based upon the discussion, supra, it is clear that Shell's counterclaim should have remained in state court. The TECA, however, excused Shell's refiling of the remanded counterclaim as a complaint in federal court, stating:

> "Because federal courts have exclusive jurisdiction over the claims raised by Shell, (Economic Stabilization Act of 1970, §210 12 U.S.C. §1904 note) Shell filed an independent action in federal court following the remand in order to pursue its claim in the proper forum."
> (TECA No. 9-47, Slip op. at 4,

n.1, July 21, 1980). (Appendix A).

The TECA's statement that Shell's remanded counterclaim had to be refiled in federal court as a complaint, because federal courts have exclusive jurisdiction over issues involving the Economic Stabilization Act, is mistaken. The issue was addressed in Hampton House Management Corp. v. Saleh, 357 F.Supp. 591 (S.D. N.Y. 1973).

In Hampton, the defendant had removed the case and asserted, in a motion for injunctive relief, that federal jurisdiction existed under the provisions of the Economic Stabilization Act. Id. at 592. Examining the language of the Act, the court disagreed:

> "[D]efendant overlooks the exception expressly provided by [12 U.S.C. §1904, note §211]:
> '[N]othing in this sub-

> section . . . affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court.'
>
> "Thus, while the District Court enjoys exclusive jurisdiction to entertain an original action arising under the 1970 Act, it shares concurrent jurisdiction with the State Court to hear defenses predicated on the Act when raised in actions originally brought on other theories. . . . In the State Court action herein, plaintiff is not seeking any determination concerning any federal agency action; should defendant wish to assert such a claim, the statute expressly authorizes its adjudication by the State Court." 357 F.Supp. at 592-93 (emphasis added) (remanding case to state court).

Thus, the TECA's statement that Shell had to refile its remanded counterclaim as a complaint "in order to

pursue its claims in the proper forum" (Slip op. at 4, n.1) is contradicted by the actual language of the Act. See also Coan v. State of California, 11 Cal.3d 286, 289-90, 520 P.2d 1003 (1974).

Finally, there is no question here that Shell's counterclaim was remanded to the state court for adjudication. The remanding District Court ordered:

> "IT IS HEREBY ORDERED that the minute order dated December 14, 1978, and Order of Remand dated December 27, 1978, be corrected to show that the counterclaim of Shell Oil Company was remanded to the Superior Court in and for Riverside County, State of California, along with all other proceedings in this action." (emphasis added) (Appendix E).

In summary, it should first be noted that even the TECA has recognized that Shell's complaint is iden-

tical to its remanded counterclaim. (Slip op. at 4, n.1; Appendix A). Indeed, the only ground advanced by TECA for sanctioning the District Court's assumption of jurisdiction was, in fact, a misinterpretation of the pertinent provisions of the Economic Stabilization Act. Shell has truly had its way with 28 U.S.C. §1447(d); it has, in effect, rendered the statute a nullity, something to be ignored with impunity whenever tactical considerations might bring an advantage in doing so. By effectively sanctioning this tactic over the protests of Nelson, the District Court and TECA have so departed from the "accepted and usual course of judicial proceedings" as to require exercise of this Court's power of supervision.

C. SHELL HAS IMPROPERLY USED THE REMOVAL PROCEDURE FOR

THE PURPOSE OF FRUSTRATING TIMELY ACCESS TO STATE COURT.

This Court has traditionally concerned itself with preventing abuses of 28 U.S.C. §1447(d). The continuing need for such concern is dramatized by Shell's procedural tactics in the instant case.

After the federal District Court remanded this case to the state court, the state court granted a motion for partial summary adjudication of issues determining that Nelson had the right to sell Shell branded gasoline throughout the State of California. Nelson then filed a motion to determine the illegality of Shell's restriction on Nelson. While this motion was pending, and before hearing on said motion, Shell again removed the action to the federal District Court. Upon motion of Nelson the action

was again remanded to state court, but only after considerable delay and avoidance of a hearing on the summary adjudication motion. Shell certainly appears to have made the tactical decision to remove as a means of preventing a timely hearing of Nelson's motion.

These delaying tactics have consistently been criticized by the Court:

> "The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court. While Congress felt that making available a federal forum in some instances justifies some such interruption and delay, it obviously thought it equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible. If this balanced concern is disregarded, federal removal provisions may become a device affording litigants a means of substantially delaying justice.
>
> * * *

> "Congress balanced the continual disruption and delay caused by further review against the minimal possible harm to the party attempting removal -- who will still receive a trial on the merits before a state court which cannot be presumed to be unwilling or unable to afford substantial justice -- and concluded that no review should be permitted in these cases." Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 354-55, 46 L.Ed.2d 542 (1976) (Rehnquist, J., dissenting) citing Morey v. Lockhart, 123 U.S. 56, 57, 31 L.Ed. 68 (1887).

The rule that an order remanding an action to state court is final is not a harsh one; Shell is entitled to and should pursue its defenses in state court. On the other hand, however, the removal statutes should not be used as a means of preventing timely relief in state court. Otherwise, both fairness to the plaintiff, as well as the orderly functioning of the courts, are threatened.

II

THE DISTRICT COURT AND TECA ERRED IN INTERPRETING AND APPLYING THE CERTIFICATION REGULATION WITHOUT FIRST REFERRING THE ISSUE TO THE DOE, AND IN A MANNER INCOMPATIBLE WITH THE EMERGENCY PETROLEUM ALLOCATION ACT.

In considering the correctness of the District Court's interpretation of 10 C.F.R. §211.13(f) -- and, indeed, whether it was even proper for the court to attempt any interpretation without prior guidance by the DOE -- it must first be recognized that the author and primary enforcer of regulations promulgated pursuant to the authority of the Emergency Petroleum Allocation Act ["EPAA"], 15 U.S.C. §751 et seq., is the DOE. Id. §754(d); Exec. Order 11748, 39 Fed. Reg. 33575 (Dec. 6, 1973).

Assuming arguendo that the District

Court properly exercised jurisdiction in the first place (see Argument I, supra), the proper course would have been to postpone exercise of that jurisdiction and defer to the DOE for initial determination of the downward certification issue. This is especially so, given the particular circumstances of the case at bar.

The classic statement of the principles underlying the doctrine of primary jurisdiction,[1/] still vital today, was made by Mr. Justice Frankfurter:

> "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject

1/ For a good recent discussion of this doctrine, including numerous citations, see Terrell Oil Corp. v. Atlantic Richfield Co., 468 F.Supp. 860 (E.D. Tenn. 1978).

> matter should not be passed over." Far East Conference v. United States, 342 U.S. 570, 574-75, 96 L.Ed. 576 (1951) (emphasis added)

Preliminary resort to the primary jurisdiction of an administrative agency has been particularly useful to courts confronted with the complex regulatory scheme that has developed under the EPAA. See, e.g., Terrell Oil Corp. v. Atlantic Richfield Co., 468 F.Supp. 860, 865 (E.D. Tenn. 1978) (staying district court action pending review of issues by Federal Energy Administration); Orange & Rockland Utilities, Inc. v. Howard Oil Co., 416 F.Supp. 460, 466 (S.D. N.Y. 1976) (staying trial until FEA has opportunity to rule on interpretation of regulations); Eastern Air Lines, Inc. v. Mobil Oil Corp., 403 F.Supp. 757, 759 (S.D. Fla. 1975) (staying action pending interpre-

tation of regulations by FEA).

It is significant that, despite Shell's repeated attempts to obtain a DOE order requiring Nelson to downward certify, for the same reasons argued by Shell before the District Court and the TECA, the DOE determined not to issue such an order.[2/]

The reason why the District Court should have stayed the proceedings pending an explicit determination of the certification issue by the DOE, is indicated in the provisions of the EPAA. Under the Act, 15 U.S.C. §753(b)(1)(D), DOE is charged with providing, "to the maximum extent possible", for the:

> "Preservation of an economically sound and competitive petroleum industry . . . and to preserve the competitive viability of independent re-

2/ TECA No. 9-47, Slip op. at 4, July 21, 1980 (Appendix A); R.T. Vol. 3, pp. 545-47.

finers, small refiners, non-branded independent marketers, and branded independent marketers." See Exxon Corp. V. Federal Energy Administration, 417 F.Supp. 516, 522 (D. N.J. 1975); Ashland Oil Corp. v. Federal Energy Administration, 389 F.Supp. 1119, 1126 (N.D. Cal. 1975).

The singular importance of this Congressional mandate is manifest in the legislative history of the EPAA. The Act was designed to correct the shortages and dislocations in the petroleum distribution system, resulting, in part, from the refusal of the major oil companies to follow a voluntary program aimed at sharing the supplies of scarce energy resources. See H.R. Rep. No. 93-531, 93d Cong., 1st Sess. (1973); reprinted in [1973] U.S. Code Cong. & Admin. News 2582, 2587-89; see generally Mobil Oil Corp. v. Federal Energy Administration, 566 F.2d 87 (TECA, 1977).

As seen from the explicit objectives of the Act, as mandated by Congress, the DOE must consider various factors in the course of its deliberations, before a particular regulation may be enforced in a particular context. Primary among these factors is that of preserving competition.

Nelson introduced internal Shell memoranda, in its pending state action, demonstrating that Shell's foremost concern throughout this dispute has been to curb the competition of Nelson in southern California.[3/] Given the objectives of the EPAA, it is more than likely that the reason why the DOE refrained

3/ Exhibits "D", "E", and "F" to Nelson's Memorandum of Points and Authorities in Support of Motion for Partial Summary Adjudication of Issues, Nelson Oil Co., Inc. v. Shell Oil Co., et al., Los Angeles Superior Court No. C 271545.

from giving Shell the relief it sought (which the District Court nonetheless granted) was precisely because of the competition generated by Nelson.

This position is underscored by the amicus briefs submitted to the TECA by the Society of Independent Gasoline Marketers of America. The amicus demonstrated that the District Court's interpretation of 10 C.F.R. §211.13(f) would adversely affect not only Nelson's ability to meet its supply obligations under other DOE regulations, but also the needs of Nelson's customers and the general public. This result is, of course, exactly the opposite of that which the EPAA was enacted to prevent.

In these circumstances, it was reversible error for the District Court to render judgment based upon its interpre-

tation of a DOE regulation, without the initial guidance of the DOE. There was no consideration given to the effects on competition or the needs of Nelson's customers and consumers in general. Finally, the District Court's action appears to contradict the course chosen by the DOE. This latter point, itself sufficient to require deferral of the certification issue to the primary jurisdiction of the DOE, is all the more significant because, as the District Court and the TECA were informed by Nelson, the DOE is currently engaged in rulemaking proceedings that are considering generally the question of downward certification. 44 Fed. Reg. 69962.

CONCLUSION

The District Court had no jurisdiction over the instant case because the

entire proceedings had already been remanded for adjudication in state court.

Even if the District Court's assumption of jurisdiction is deemed proper, for the sake of argument, its judgment, and the TECA's affirming of the judgment, constitute reversible error. This is because the Court's interpretation and application of 10 C.F.R. §211.13(f) is inherently incompatible with the requirements of the EPAA, 15 U.S.C. §753 (b)(1)(D). Assuming the District Court had jurisdiction, it should have stayed the proceedings and deferred the question of the meaning and application of the certification regulation to the DOE. This is particularly so because the DOE is currently in the midst of rulemaking proceedings on the subject, is the author and prime enforcer of the regulations,

and because, despite Shell's requests to do so, has refrained from ordering Nelson to downward certify.

For these reasons, Petitioner respectfully requests this Court to reverse the judgment and dismiss Shell's action, or alternatively, to reverse the judgment with directions to stay further proceedings pending a determination by DOE as to the certification requirements.

Respectfully submitted,

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TABLE OF CONTENTS

APPENDIX A

OPINION OF THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES, SHELL OIL COMPANY, Plaintiff-Appellee v. NELSON OIL COMPANY, INC., Defendant-Appellant, No. 9-47, July 21, 1980

APPENDIX B

DENIAL OF NELSON OIL COMPANY'S PETITION FOR REHEARING, TECA, No. 9-47, September 2, 1980

APPENDIX C

FINDINGS OF FACT AND CONCLUSIONS OF LAW, U. S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA (Hon. Manuel Real), SHELL OIL COMPANY v. NELSON OIL COMPANY, CV 79-694-R, filed November 23, 1979

APPENDIX D

JUDGMENT, U. S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA (Hon. Manuel Real), SHELL OIL COMPANY v. NELSON OIL COMPANY, CV 79-694-R, entered December 5, 1979

APPENDIX E

ORDER TO REMAND (28 U.S.C. 1447(c)), U. S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, (Hon. Robert Firth), NELSON OIL COMPANY, INC. v. SHELL OIL COMPANY, et al., CV 78-3790-RF, entered December 27, 1978;

and

ORDER PURSUANT TO RULE 60, U. S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, (Hon. Robert Firth), NELSON OIL COMPANY, INC. v. SHELL OIL COMPANY, CV 78-3790-RF, filed July 25, 1979

APPENDIX F

ORDER TO REMAND (28 U.S.C. 1447(c)), U. S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA (Hon. David Williams), NELSON OIL COMPANY v. SHELL OIL COMPANY, et al., CV 80-03184-DWW, filed August 19, 1980

APPENDIX G

ECONOMIC STABILIZATION ACT OF 1970, 12 U.S.C. §1904, note §§210, 211 [pertinent parts]

APPENDIX H

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, 15 U.S.C. §751 et seq. [pertinent parts]

APPENDIX I

28 U.S.C. §1447(d)

APPENDIX J

10 C.F.R. §211.13(f)

APPENDIX A

OPINION OF THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES, SHELL OIL COMPANY, Plaintiff-Appellee v. NELSON OIL COMPANY, INC., Defendant-Appellant, No. 9-47, July 21, 1980

TEMPORARY EMERGENCY COURT OF APPEALS

OF THE UNITED STATES

No. 9-47

SHELL OIL COMPANY, PLAINTIFF-APPELLEE,

v.

NELSON OIL COMPANY, INC., DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Central District of California

(No. CV 79-694-R)

(Argued: May 9, 1980

Decided: July 21, 1980)

JOHN G. KESTER, of Williams & Connolly, Washington, D.C., with whom Philip J. Ward, of the same firm, and Jerome H. Craig, Warren L. Ettinger and Evelyn Balderman, of Beardsley, Hufstedler & Kemple, Los Angeles, California, were on the brief for defendant-appellant.

WILLIAM O'BRIEN, of Howrey & Simon, Washington, D.C., with whom William Simon and Eugene M. Katz, of the same firm, and Max L. Gillam, Philip F. Belleville and Alan B. Clark, of Latham & Watkins, Los Angeles, California, were on the brief for plaintiff-appellee.

William W. Scott, of Collier, Shannon, Rill & Scott, Washington, D.C., was on the brief for amicus curiae.

Before: JAMESON, DUNIWAY and ZIRPOLI, Judges.

DUNIWAY, Judge:

Nelson Oil Company (Nelson) appeals from a decision of the district court finding Nelson in violation of the Department of Energy (DOE)'s gaso-

line allocation regu-[2]lations, 10 C.F.R. §211 et seq., awarding to Shell Oil Company (Shell) $617,308.98 in damages, and granting an injunction decreasing Nelson's base period gasoline allocation by 17,936,929 gallons annually. We affirm.

I. THE FACTS

DOE regulations, 10 C.F.R. Part 211, Subpart F, §§211.101 et seq., promulgated under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 et seq., govern the amount of motor gasoline which a supplier is required to allocate and sell to its customers. The allocation amounts are based on the historic or base period use of its customers, with appropriate adjustments. Until the amendment of the DOE regulations in March, 1979, the "base period" for establishing

monthly allocations was the corresponding month of 1972. In March, 1979, the base period was changed and currently is the corresponding month during the period November 1, 1977 through October 31, 1978, 44 Fed. Reg. No. 41, 11202 (February 28, 1979).

Nelson is a wholesale jobber of Shell motor gasoline and other petroleum products, and therefore, a wholesale purchaser-reseller, 10 C.F.R. § 211.51. At all relevant times Nelson and Shell have had a supplier-purchaser relationship, 10 C.F.R. § 211.9. Accordingly, Nelson has been entitled to receive gasoline from Shell in accordance with DOE allocation regulations.

As of March, 1976, when Nelson's present owner, John D. Castellucci, acquired Nelson, its adjusted base

period gasoline allocation was approximately 494,500 gallons per month, or 5.9 million gallons per year. This was the volume which Shell was obligated to supply to Nelson under the contract entered into by the parties at that time.

[3] Soon after Castellucci acquired Nelson, he began to use DOE upward certification regulations to increase the amounts of gasoline Shell was required to supply to Nelson. Nelson sought and received from DOE numerous orders assigning new wholesale purchasers to Nelson, 10 C.F.R. § 211.12. In each instance, Nelson asked that its allocation of gasoline from Shell be increased to allow Nelson to supply the new customers, 10 C.F.R. § 211.13. As a result of this upward

certification procedure, Nelson's annual gasoline allocation from Shell increased by over 33 million gallons. Shell was obliged to and did supply Nelson its full monthly allocation (or allocation fraction) for each month during the period January, 1976 through May, 1979.

Each DOE assignment order issued to Nelson specifies the retail outlet which is being assigned and the allocation volume to be supplied by Nelson to the retail outlet. In applications submitted to DOE by the retail outlets, Nelson, as a prospective new supplier, expressly affirmed that it was a willing supplier of the retail outlet, and that if the application were granted, Nelson would supply to the applicant the volume of gasoline set forth in the

application. In addition, beginning in January, 1977, Nelson certified in writing to Shell that the additional gasoline supplied pursuant to Nelson's upward certification would be used only for the use stated in the application--sales to the retail outlet designated in the DOE assignment order.

This certification by Nelson was required by 10 C.F.R. § 211.13(f), which states:

> Such application [for upward certification] shall contain a statement that increased allocations shall be used for the purpose stated in the application, shall not be diverted for other uses; and that if its needs decline, the purchaser shall file an amended [4] ap-

plication for a downward adjustment to its base period use.

In fact, Nelson did not supply any gasoline to many of the DOE assigned retail outlets. Nor did Nelson return such gasoline to Shell. Rather, Nelson sold large volumes of the gasoline to other retail outlets, including five outlets that Nelson operated which had either no allocation orders or adjusted base period entitlements much lower than the amounts that were actually supplied to them.

The district court found that during the period from September, 1976 through May, 1979, Nelson had either totally failed to supply or had not supplied on a regular basis fifteen DOE assigned retail outlets having an annual allocation of almost 18 million

gallons. Nelson did not seek downward adjustment of any of its certifications during this period.

Shell expressed concern to DOE that Nelson and other jobbers were abusing the regulatory system through the techniques described above. When DOE took no action, Shell filed this action to enforce DOE regulations on February 20, 1979, seeking damages, injunctive relief and a declaratory judgment that Nelson's conduct justified termination of its jobber contract under the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. § 2801 et seq.[1]

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[1]The claims stated by Shell in its complaint were originally pleaded in a counterclaim against Nelson in an action charging unfair competition brought by Nelson. Shell removed that case to federal court and thereupon filed its counterclaim. That case was remanded to state court in December, 1978. Be-

On April 20, 1979, Nelson filed an answer [5] and counterclaim asserting three violations by Shell of DOE regulations. On Shell's motion, the district court dismissed two of the claims as insufficient as a matter of law, and the third claim, that Shell had redistributed "underlifted"[2] gasoline to Nelson in a discriminatory manner, proceeded to trial.

(cont'd 1) cause federal courts have exclusive jurisdiction over the claims raised by Snell, (Economic Stabilization Act of 1970, § 210, 12 U.S.C. § 1904 note) Shell filed an independent action in federal court following the remand in order to pursue its claims in the proper forum.

[2]"Underlifted" gasoline is gasoline allocated to a retail outlet which that outlet does not purchase because of insufficient demand from the outlet's customers.

At trial, the judge ruled in favor of Shell on both the complaint and counterclaim. The district court held that § 211.13(f) of the DOE regulations required that Nelson downward certify to Shell the annual volume of gasoline obtained by Nelson from Shell pursuant to assignment orders on fifteen retail outlets, whose annual allocations Nelson had diverted to other uses. The court held that Nelson's diversion of this gasoline amounted to a willful and blatant violation of the DOE regulations, and that Shell had been injured by it. The court therefore entered an injunction reducing Nelson's annual adjusted base allocation from Shell by the 17,936,929 gallons accounted for by the upward certifications received by Nelson for

the fifteen outlets. The court further found that the total amount of gasoline obtained from Shell and wrongfully diverted to other uses was 20,440,695 gallons.[3] It awarded Shell damages of $617,308.98.[4] [6] With regard to Nelson's counterclaim, the trial judge ruled that Shell's method of distributing underlifted gasoline was a fair,

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[3]In arriving at this figure, the court reduced the total underdeliveries to the fifteen accounts by 30%, giving Nelson the benefit of the redirection provisions of 10 C.F.R. § 211.06(b)(3)(iii).

[4]The court further held that Shell had proper and sufficient grounds to terminate Nelson's jobber contract under Sections 2802(b)(1)(B) and (c)(11) of the PMPA. We do not consider this further holding. Nelson has appealed this portion of the district court's decision to the Court of Appeals for the Ninth Circuit and no disposition has yet been made by that court.

proper and rational method of accomplishing such redistribution and fully complied with the applicable regulations.

II. JURISDICTION

Nelson argues that the central dispute in this case--the application of 10 C.F.R. § 211.13(f) to the situation involved here--was within the primary jurisdiction of the DOE, and that the district court erred in not deferring to this primary jurisdiction. We disagree.

Section 210 of the Economic Stabilization Act of 1970 (12 U.S.C. § 1904, note) provides for a private right of action in federal district courts and states in pertinent part:

> (a) Any person suffering legal wrong because of any act or

> practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction . . . and/or damages.

Thus, the district court had jurisdiction.

However, jurisdiction in the district court is only a first step in the inquiry into whether an administrative agency has primary jurisdiction over a case. The doctrine of primary jurisdiction does not determine whether the court will ultimately decide an issue,

it merely decides whether the court will postpone such a decision to allow an administrative agency to make the initial decision. See Writers Guild of America v. American Broadcasting, 9 Cir., 1979, 609 F.2d 355, 363. See also, 3 [7] Davis, Administrative Law Treatise § 19.01 at 205 (1958).

When a trial court has jurisdiction over the subject matter of a lawsuit as it did here,[5] the determination

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[5]Nelson's argument that the district court did not have subject matter jurisdiction over Shell's claim because that claim was identical to the counterclaim remanded to the state court along with Nelson's unfair competition suit is wrong. Federal courts have exclusive jurisdiction over the claims raised by Shell, see note 1, supra. Because the state court is unable to consider Shell's counterclaim, it was appropriate for Shell to file an independent action in federal court following the remand in order to pursue its claim in the proper forum.

of whether to defer to a regulatory agency with concurrent jurisdiction is controlled by a determination as to whether the reasons for the existence of the doctrine of primary jurisdiction will be forwarded by its application. United States v. Western Pacific R. Co., 1956, 352 U.S. 59, 64. Uniformity of regulations and the use of the expert and specialized knowledge of the agency are most often cited as the basis for the doctrine. See Far East Conference v. United States, 1952, 342 U.S. 570, 574-575.

The doctrine of primary jurisdiction does not apply where the only task facing the district court is to "determine the meaning of words . . . which were used in their ordinary sense and to apply that meaning to the undisputed

facts." Great Northern Railway v. Merchant's Elevator Co., 1922, 259 U.S. 285, 294.

Here, the district court found that the regulations, particularly 10 C.F.R. § 211.13(f), were clear, and proceeded to apply them to the fact situation involved. There was no question involved as to the validity or the reasonableness of the regulations, see Nader v. Allegheny Airlines, Inc., 1976, 426 U.S. 290, 304, 306, but merely whether the regulations had been violated, see United States Tour Operators Ass'n v. Trans World Airlines, [8] Inc., 2 Cir., 1977, 556 F.2d 126, 130. Application of the regulation did not require the specialized expertise of the DOE. See Nader, supra, 426 U.S. at 304-305. Jurisdiction in the district court was proper.

Nor is this case one in which the agency has primary jurisdiction because of ongoing agency proceedings. The agency proceedings cited by Nelson, while involving downward certification, concern the extension of downward certification regulations to all customers rather than merely to new customers assigned pursuant to § 211.12(e) and § 211.13(c). See 44 Fed. Reg. 69963. These rule-making proceedings are not useful in clarifying the already clear regulatory structure of § 211, the violation of which Shell is asserting. Nor is this a case in which pending administrative proceedings consider the issues adjudicated here. Thus, DOE need not be deferred to because of such proceedings.

III. VIOLATION OF 10 C.F.R. § 211.13(f)

Nelson does not challenge the sufficiency of the evidence to support the district court's findings. Rather, it claims that the district court misinterpreted the downward certification regulation. This claim is based on two alternate arguments: First, Nelson argues that no downward certification was required until its "supply obligation" to its retail outlet customers was formally terminated by DOE. Second, Nelson argues that the recently proposed downward certification regulations confirm that there was no such obligation under existing regulations. Each of these arguments is without merit.

10 C.F.R. § 211.13(f) clearly states Nelson's obligations to Shell,

its supplier, when applying for an upward adjustment of its allocation based on a DOE assignment. See the regulation, supra, pages 3 and 4.

[9] Moreover, in May, 1977, Nelson filed a Request for Interpretation with DOE with respect to the certification requirement of § 211.13(f). Nelson argued that it was required to certify only that an increased allocation would be used for resale to wholesale purchaser-resellers as a class and that, therefore, downward certification would be necessary only if its total needs for gasoline for resale were to decline, and not if its needs with respect to the particular outlet named in the assignment order declined. In Interpretation 1978-24, 43 Fed. Reg. No. 112, 25079 (June 9, 1978), DOE rejected

Nelson's contentions, stating that the certification provision of § 211.13(f) applies to a specific volume of product allocated to each assigned new customer, and not to broad categories of general uses. Thus, downward certification was required if Nelson's needs to supply any particular assigned location declined.

Nelson's conduct did not change in response to this DOE Interpretation. Nelson argues that its "needs to supply" do not decline until its "supply obligation" to its customer is formally diminished or terminated by DOE. This argument is undercut also by this statement in the DOE Interpretation:

> Thus, if the new assigned customer ceases purchasing the

> motor gasoline from it, Nelson argues that the additional product becomes surplus which may be disposed of by Nelson to other firms. . . .
>
> Nelson's construction of § 211.13 (f) is incorrect. (emphasis added) 43 Fed. Reg. No. 112 at 25082.

Nelson argues that it had no obligation to downward certify because it was required to hold available the additional volume of gasoline in the event that the assigned customer demanded to be supplied in the future. This argument fails. Section 211.13(f) imposes an obligation to downward certify with no mention of DOE intervention to terminate an assigned customer's alloca-[10]tion. It requires downward

certification whenever the applicant's needs to supply a new customer cease or are substantially reduced. This requirement is clear. If a more complicated regulatory scheme had been envisioned, it would have been specified.

Nelson's argument that the upward and downward certification procedures ought to be symmetrical, each triggered by a DOE assignment or reassignment of a retail customer to a wholesale purchaser-reseller, has some appeal in the abstract. However, that appeal rapidly disappears when the downward certification regulation is examined. Not only does the regulation require downward certification if the wholesale purchaser-reseller's needs decline, with no mention of DOE action as a pre-

requisite, but it also requires the wholesale purchaser-reseller to certify that the portion of its gasoline allocation which increases because of upward certification will be used for a single purpose--to supply the newly assigned customer. When these two provisions are read together, it becomes obvious that the upward and downward certification regulations are not symmetrical.

This obvious interpretation of the regulation is not in conflict with statements of Nelson that retail outlets regularly purchase from non-assigned wholesalers and that the readjustment in the base period recently adopted condones such action. The downward certification requirement of § 211.13(f), unlike that in the proposed new regu-

lations, applies only to decreases in need attributable to new customers or to increased demand of base period customers assigned to the wholesaler after the base period. In other words, only supply obligations resulting from upward certification are affected by § 211.13(f) downward certification provisions.

It also cannot be argued that Nelson in fact had a continuing supply obligation to serve customers such as its Sav-Mor accounts when Sav-Mor had expressly can-[11]celled Nelson's supply contract and purchased virtually no gasoline from Nelson. Nor can it be argued that Nelson had a continuing supply obligation to retail outlets that were permanently closed, were selling other major brands of gasoline,

or had never been supplied by Nelson at all.

Nelson's contention that it could not downward certify because its assigned customers might demand gasoline in the future also fails. Nelson does not show that it could not downward certify with respect to the customers involved and upward certify at a later date if the customer demanded gasoline from Nelson. Furthermore, the evidence shows that Nelson, in one instance, refused to honor the request of an assigned customer for its allocated supply and, in another instance, effectively did the same by imposing unusually stringent credit terms on its offer to supply.

Nelson's alternative reliance on the recently proposed downward certi-

fication regulations is similary unavailing. The proposed rules are described by DOE as "general downward certification provisions," 44 Fed. Reg. No. 235, 69963 (December 5, 1979), and would require downward certification with respect to base period customers as well as newly assigned customers whose assignment was accompanied by upward certification. Rather than suggesting that there was no downward certification procedure in the existing regulations, the DOE's Notice cf Proposed Rulemaking explicitly recognized the § 211.13(f) downward certification requirement:

> 10 C.F.R. 211.13(f), the only current provision dealing with downward adjustments is limited in scope. It applies where a

> wholesale purchaser-reseller that has received an upward adjustment to its base period use based on an increased supply obligations to one of its purchasers subsequently terminates or sig-[12]nificantly reduces its supply obligation to that purchaser.

This statement does not support the narrow view of the downward certification requirement suggested by Nelson. By referring to a supply obligation terminated or reduced by the wholesale purchaser-reseller, again with no reference to any formal termination by DOE, this statement is consistent with the interpretation of § 211.13(f) adopted by the district court and now affirmed by this court.

The district court correctly held that § 211.13(f) required Nelson to use the gasoline it obtained from Shell as a result of upward certification only for the purposes stated in the assignment orders--to supply the allocated gasoline to specific retail outlets--and not to divert the gasoline to other uses. Nelson was further obligated to downward certify to Shell when it no longer needed the allocated gasoline to supply the designated outlets. Under the facts here establishing continuous diversion of large volumes of gasoline from other assigned outlets to Nelson's own retail outlets and to other uses, the district court correctly found that Nelson had engaged in a willful and blatant violation of § 211.13(f). Nelson was not using the regulations; it

was abusing them.

IV. INJUNCTIVE RELIEF

Nelson does not challenge the correctness of the district court's award of damages, assuming that both jurisdiction and the district court's interpretation of § 211.13(f) are correct. Nelson does, however, challenge the injunctive relief reducing its base period allocation. We hold that the injunctive relief was appropriate in this case.

Nelson first argues that the district court erred in failing to establish a fixed standard, defining both the [13] length of time a jobber must fail to supply DOE assigned accounts and the percentage of allocations not supplied, before the obligation to downward certify accrues. There is no

such prerequisite for granting relief here. The regulation stated the standard: when a jobber's needs decline. The facts in this case present a clear violation of that standard. It was unnecessary for the district court or for this court to decide on what lesser presentation injunctive relief would or would not also be available.

The trial record establishes fifteen specific retail outlets for which Nelson had DOE assignment orders but which it did not supply. The district court accordingly reduced Nelson's allocation from Shell by that portion of the annual allocation attributable to the assignment of those stations.[6] This reduction was correct.

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[6]Although Nelson contends that the district court ordered the allocation

Second, Nelson claims that DOE's adoption of a new base period, 44 Fed. Reg. No. 140, 42549 (July 19, 1979), invalidates the injunctive relief. Nelson's argument, were we to accept it, would cause DOE's adoption of a new base period to pardon prior illegal conduct and reward violators of the regulations. We cannot accept such an argument. DOE's adoption of the new base period was made "to reflect market realities," but the changes brought about by Nelson's abusive conduct are not the type of "market reality" that DOE intended to accommodate. The Preamble to DOE's Activation Order No. 1,

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(cont'd 6) reduced by the total amount of gasoline attributable to these assignments and unpurchased over the two and one-half year period, September, 1976 to May, 1979, this contention is incorrect.

44 Fed. Reg. 11,202 (Feb. 28, 1979), which changed the base period, demonstrates that the new base period was established to take into account changes in distribution patterns resulting from normal competitive market forces which had caused the business of certain firms to expand since 1972, while that of other firms had [14] declined. This had resulted in the redistribution of surplus gasoline on a regular basis. Recognition of the fact that wholesaler purchaser-resellers had gasoline which they were redistributing among retail outlets does not support Nelson's position. It merely shows that with respect to customers for whom no upward certification was received, there were changes in demand which the wholesale purchaser-reseller was free to

deal with.

The judgment in this case did not involve redistributed surplus. It involved gasoline obtained by Nelson from Shell under false pretenses. The change in the base period was not intended to legitimate and continue this type of change in supply relationships violative of federal law.

The injunctive relief merely acts to take away from Nelson that portion of its allocation that it should have downward certified. Nelson is put in the position it would have been in had it complied with DOE regulations. The judgment enforces DOE allocation regulations. The judgment enforces DOE allocation regulations and carries out the allocation scheme that the regulations were designed to establish and foster.

V. RULINGS ON NELSON'S COUNTERCLAIMS

Nelson challenges the district court's dismissal of two of its counterclaims. It also challenges the disposition of its third counterclaim. We find no error.

Nelson's claim that Shell unlawfully changed Nelson's credit terms in June, 1973 by changing the location to which Nelson was required to deliver credit card invoices was properly dismissed as barred by the applicable three year California statute of limitations. Cal. C.C.P. §§ 340(1), 338 (1); Ashland Oil Co. of Cal. v. Union Oil Co. of Cal., Em. App., 1977, 567 F.2d 984. The counterclaim disclosed on its face that the challenged conduct [15] occurred on June 20, 1973,

and Nelson's counterclaim was filed on April 20, 1979.

Nelson's claim that Shell had violated DOE regulations prohibiting retaliatory action by allegedly filing this action in retaliation for Nelson's state court unfair competition suit did not state a claim on which relief could be granted and was, therefore, properly dismissed. 10 C.F.R. § 201.61 bars only retaliation for exercise of rights under the Emergency Petroleum Act or regulations pursuant to that Act. Because Nelson's state law unfair competition action was not such an exercise of rights, the counterclaim was fatally defective.

The district court ruled in favor of Shell after trial on Nelson's counterclaim alleging discrimination in

the redistribution of surplus or "underlifted" gasoline during the period April, 1975 through July, 1976. Nelson relies on DOE Interpretation 1977-41, 42 Fed. Reg. No. 232, 61273 (December 2, 1977), to challenge this ruling. 10 C.F.R. § 211.10(g)(5) governs the manner in which a supplier may redistribute underlifted gasoline. Interpretation 1977-41 requires only that this redistribution be non-discriminatory, not that an equal percentage share of the gasoline be given to each customer or group of customers.

During the period to which Nelson's claim relates, Shell redistributed its underlifted gasoline by subclasses--to direct supplied retail customers the amount of underlifted product that was created by that subclass, to wholesale

jobbers the amount of underlifted product that was created by that subclass, etc. The district court found that this proportional method of redistribution was not unlawfully discriminatory but instead was fair, proper and rational. We agree.

Affirmed.

APPENDIX B

DENIAL OF NELSON OIL COMPANY'S PETITION FOR REHEARING, TECA, No. 9-47, September 2, 1980

TEMPORARY EMERGENCY COURT OF APPEALS

OF THE UNITED STATES

No. 9-47

SHELL OIL COMPANY,

Plaintiff-Appellee,

v.

NELSON OIL COMPANY, INC.,

Defendant-Appellant.

BEFORE THE T.E.C.A. COURT:

Upon consideration of Appellant Nelson Oil Company, Inc.'s Petition for Rehearing and Suggestion for Rehearing en banc, it is ORDERED that said Petition is DENIED. The mandate will issue on September 9, 1980.

FOR THE COURT:

Ruth H Jacobson

Clerk

By: /s/ Richard D.

Dumont

Deputy Clerk

September 2, 1980

APPENDIX C

FINDINGS OF FACT AND CONCLUSIONS OF LAW, U. S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA (Hon. Manuel Real), SHELL OIL COMPANY v. NELSON OIL COMPANY, CV 79-694-R, filed November 23, 1979

FILED

NOV 23 1979

CLERK, U. S. DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHELL OIL COMPANY, a Delaware corporation, Plaintiff, vs. NELSON OIL COMPANY, A California corporation, Defendant.	CV 79-694-R FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff Shell is a corporation organized under the laws of the State of

Delaware, with its principal place of business at One Shell Plaza, Houston, Texas. Shell is qualified to, and does, transact business in the State of California. [2] Shell is engaged in the marketing of petroleum products, including motor fuel, to both wholesale jobbers and retail service station outlets in the State of California.

2. Defendant Nelson is a California corporation qualified to do business in that state, with offices at 1403 Gaylord Street, Long Beach, California, and a bulk plant at 344 East Bryant Street, Banning, California. Nelson is an independent wholesale jobber of Shell branded gasoline and other products to retail service station outlets and other customers, including sales to customers at retail service stations

operated by Nelson. By nature of its operations, Nelson is both a supplier and a wholesale purchaser-reseller of motor gasoline as said terms are defined by regulations promulgated by the United States Department of Energy ("DOE").

3. The facts giving rise to this action occured in substantial part within the Central District of California and the claims asserted arise under federal statutes and regulations.

4. Shell has had a business relationship with Nelson as a wholesale jobber in Banning, California, for many years. On or about March 1, 1976, Shell and Nelson entered into the most recent jobber contract between the parties. That contract provided for the sale of Shell petroleum products, in-

cluding motor fuel, to Nelson, and authorized Nelson to use Shell's trademarks in connection with the sale of such products for the term of the contract. The contract provided the maximum amount of gasoline which Shell was obligated to supply to Nelson each month pursuant [3] to said contract, which amounts were approximately 494,500 gallons per month or 5.9 million gallons annually.

5. DOE regulations, 10 C.F.R. Part 211, promulgated under the Economic Stabilization Act and the Emergency Petroleum Allocation Act, govern the amount of motor gasoline which a supplier is required to allocate and sell to its customers. Such allocation amounts are based on the historic or base period use of such customers. Until the

amendment of the current DOE regulations in March, 1979, the "base period" for establishing monthly allocations was the corresponding month of 1972. In March, 1979, the base period under the DOE regulations was changed, and the current regulations made the base period the corresponding month during the period November 1, 1977 through October 31, 1977.

6. On at least twenty-nine occasions since March 1, 1976, Nelson has received from DOE orders assigning new wholesale purchasers, i.e., retail service stations, to Nelson pursuant to the provisions of 10 C.F.R. §211.12, and has thereafter requested that its allocation of gasoline from Shell be increased pursuant to the provisions of 10 C.F.R. §211.13, so as to supply such

new customers. In each instance, Nelson's request for additional gasoline was granted by Shell.

7. Each of the DOE assignment orders specifies the specific retail service station which is being assigned and the allocation volume which Nelson, the new supplier, is obligated to provide to the assigned customer at that location.

[4] 8. In applications submitted to DOE with regard to the requests for assignment of a new supplier, Nelson, as the prospective new supplier, states to DOE that it is a willing supplier of the retail service station making the application. (The applications are submitted by using a DOE form known as "FEO-17.") For each of the twenty-nine retail service stations concerning

which DOE orders have been entered, Nelson has signed an FEO-17, or has otherwise notified DOE of the fact that it is a willing supplier of the applicant and will supply to the applicant the volume of gasoline set forth in the applications and the subsequent DOE assignment orders.

9. With regard to each assignment order received by Nelson from DOE, Nelson has sought and received from Shell an upward adjustment in its monthly base period allocation, which was upwardly adjusted by the amounts of gasoline specified in each respective assignment order.

10. As a result of such upward adjustments, Nelson's monthly allocations increased substantially, and Shell was obliged to and did supply to Nelson its

full monthly allocations or allocation fraction (where applicable) for each month during the period January, 1976, through May, 1979.

11. In numerous instances, Nelson did not supply the gasoline it received from Shell as a result of DOE assignment orders to the retail outlet specified in the DOE assignment [5] orders, nor did it return such gasoline to Shell, but rather diverted such gasoline to other uses not provided for or authorized by the DOE assignment orders.

12. The retail outlets, and the annual allocation of each, for which Nelson received DOE assignment orders but to which Nelson has not supplied gasoline on a regular basis, and in some instances has never supplied gasoline at all, are:

	Service Station	Yearly Allocation (Gallons)
(1)	Mars Oil Co. 895 4th Avenue Yuma, Arizona	1,824,443
(2)	Robin Oil Co. 1796 W. Highland San Bernardino, California	537,631
(3)	Robin Oil Co. 295 E. Holt Pomona, California	2,412,000
(4)	Robin Oil Co. 1207 E. Mission Pomona, California	2,412,000
(5)	Sav-Mor Oil Co. 2905 Riverside Bloomington, California	753,443
(6)	Sav-Mor Co. 2415 Ramsey Banning, California	534,111

[6]	Service Station	Yearly Allocation (Gallons)
(7)	Sav-Mor Oil Co. 1187 Mission Pomona, California	721,409
(8)	Sav-Mor Oil Co. 1008 Highland San Bernardino, California	671,207
(9)	Sav-Mor Oil Co. 9432 Sierra Fontana, California	705,437
(10)	Sav-Mor Oil Co. 2238 Hamner Norco, California	1,246,714
(11)	Sav-Mor Oil Co. 315 State San Jacinto, California	668,222
(12)	Sav-Mor Oil Co. 447 Foothill Monrovia, California	435,028

(13)	Target Enterprises 2501 Canada Glendale, California	465,000
(14)	Target Enterprises 2155 S. Atlantic City of Commerce, Ca.	1,995,264

[7]

Service Station	Yearly Allocation (Gallons)
(15) Target Enterprises 15407 Crenshaw Gardena, California	2,554,020
Total:	17,935,929

13. Under the provisions of 10 C.F.R. §211.13(f), Nelson was obligated to use the gasoline it received from Shell as a result of the aforementioned upward adjustments only for the purpose set forth in each respective assignment order, i.e., to supply the amounts of gasoline set forth in the order to the

retail outlet named in the order; and not to divert that gasoline to other uses. Nelson was also obligated by 10 C.F.R. §211.13(f) to submit to Shell a downward certification, so that Nelson's base period allocation could be appropriately adjusted downward, in the event Nelson did not need the gasoline it received from Shell pursuant to a DOE assignment order for the purpose set forth in that order.

14. In spite of the fact that Nelson has not supplied on a regular basis the fifteen retail service stations identified above, Nelson has never submitted to Shell a downward certification for any of those stations, but rather has continued to draw from Shell gasoline which was to have been supplied to those stations, and has di-

verted that gasoline to other uses.

[8] 15. With regard to the eight service stations operated by Sav-Mor Oil Company, Nelson was notified by Sav-Mor in September, 1976, that Sav-Mor wished to cancel its supply agreement with Nelson and withdraw the applications for assignment by DOE of Nelson as Sav-Mor's supplier. In spite of this notice to Nelson of Sav-Mor's termination of the supplier relationship it had with Nelson, and in spite of the fact that Nelson has never supplied on a regular basis any of the Sav-Mor stations, Nelson requested that Shell make available, and Nelson drew from Shell, the amounts of gasoline specified in the DOE orders for supply to the Sav-Mor stations, failed to downward certify such amounts to Shell, and di-

verted such gasoline to other uses.

16. Nelson's actions in diverting gasoline obtained from Shell pursuant to DOE assignment orders from the customers named in said orders to other uses constitute willful and blatant violations of the gasoline allocation regulations promulgated by DOE, and Shell has been damaged thereby

17. During the period from September, 1976 through May, 1979, Nelson has willfully and unlawfully diverted a total of 20,440,695 gallons of gasoline, which figure represents the total undelivered allocations for the eight Sav-Mor stations identified in paragraph 12 above, and the undelivered allocations, less thirty percent (pursuant to the redirection provisions of 10 C.F.R. §211.106(b)(3)(ii), for the

three Target stations, the three Robin stations, and the one Mars station [9] identified in paragraph 12 above. The total gallonage figures for each are as follows:

Sav-Mor	13,907,630
Robin	2,136,618
Mars	2,355,044
Target	2,041,403

18. As a result of Nelson's willful and blatant violations, Shell has been denied this gasoline which otherwise would have been available for distribution to Shell's customers, many of which paid Shell a higher price than Nelson. Shell has suffered an average loss of $.0302 on each illegally diverted gallon of gasoline, or a total of $617,308.98.

19. Nelson's willful and blatant

violations of federal regulations give Shell proper and adequate grounds for terminating Nelson's jobber franchise and supply agreement under the Petroleum Marketing Practices Act.

20. Nelson's counterclaim for damages with regard to Shell's method of redistributing underlifted or surplus gasoline is limited to the period April, 1975 through July, 1976.

21. During the period April, 1975 through July, 1976, Shell redistributed its underlifted gasoline by making such underlifted amounts available to branded wholesaler purchaser-resellers by subclass, i.e., Shell redistributed to direct supplied retail customers the amount of underlifted product that was created by that subclass, and Shell redistributed to wholesale jobbers the

amount of underlifted product that was created by that subclass.

[10] 22. Shell's method of redistributing underlifted gasoline was not discriminatory, but was a fair, proper, and rational method of accomplishing such redistribution.

23. Nelson is a Shell jobber of motor gasoline and, as such, is a wholesale purchaser-reseller as defined in 10 C.F.R. Section 211.51. At all times relevant to this action, Nelson and Shell have had a supplier-purchaser relationship as set forth in 10 C.F.R. Section 211.9, and pursuant to such regulation, Nelson as Shell's customer, is entitled to receive gasoline from Shell in accordance with the applicable scheme set forth by the DOE regulations.

24. Nelson is a supplier as that

term is used in C.F.R. Section 211.10.

25. 10 C.F.R. Section 211.12 applies to the relationship between Shell and Nelson as well as to that between Nelson and its allocated customers.

CONCLUSIONS OF LAW

26. Jurisdiction and venue lie in this Court under the Economic Stabilization Act of 1970, 12 U.S.C. Section 1904 note; the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Sections 751 et seq.; the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. Sections 1331, 1332, 1337, 2201 and 2202; and the Federal Rules of Civil Procedure, Rule 57; and the venue provisions of 28 U.S.C. Section 1391.

27. DOE gasoline allocation regulations, 10 C.F.R. Section 211.13(f), equire that a wholesale purchaser-

reseller who receives a DOE order for assignment as a base period supplier of a retail service station, and who receives an upward adjustment [11] in its base period allocation from its supplier as a result of that assignment, must use that increase in allocation only for the purpose set forth in the order, i.e., to supply the retail station named in the order; and that such increase in allocation not be diverted to other purposes. The regulations also require that the wholesale purchaser-reseller provide its supplier with a downward certification if it does not need the increase in allocation for the purposes specified in the order.

28. Nelson has willfully and blatantly violated DOE gasoline allocation regulations by diverting to uses other

than those set forth in each DOE gasoline assignment order [12] gasoline received from Shell pursuant to upward adjustments to Nelson's base period resulting from such assignment orders.

29. Because of Nelson's violations of the DOE Regulations, Nelson's base period allocation from Shell would be reduced by the gross amounts of the DOE allocation orders for the fifteen retail outlets identified in paragraph 12 above, or 17,935,929 gallons.

30. Nelson's willful and blatant violations of DOE gasoline allocation regulations are proper and sufficient grounds under Sections 2802(b)(1)(B) and 2802(c)(11) of the Petroleum Marketing Practices Act for the termination of Nelson's jobber franchise and supply agreement.

31. 10 C.F.R. § 211.10(g)(5) provides that a supplier may redistribute its surplus or underlifted gasoline at its discretion, provided that all branded and unbranded independent marketers which are entitled to receive an allocation from the supplier shall be supplied, in the aggregate, at least the same proportion of the suppliers' surplus or underlifted product as the total unadjusted base period volumes of branded and unbranded independent marketers, which are entitled to receive an allocation from that supplier, bear to the total unadjusted base period volumes of all of the supplier's purchasers which are entitled to receive an allocation from that supplier.

32. Shell's method of redistributing underlifted gasoline during the

period April, 1975 through July, 1976 was not [13] discriminatory, but was fair, proper, and reasonable, and in compliance with 10 C.F.R. § 211.10(g)(5).

Dated at Los Angeles, California, this 21st day of November, 1979.

/s/
United States District Judge

APPENDIX D

JUDGMENT, U. S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA (Hon. Manuel Real), SHELL OIL COMPANY v. NELSON OIL COMPANY, CV 79-694-R, entered December 5, 1979

LODGED

Nov 9 1979

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BY DEPUTY

FILED

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NOV 23 1979

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BY DEPUTY

ENTERED

DEC 5 1979

CLERK, U.S. DISTRICT COURT
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHELL OIL COMPANY, a Delaware corporation, Plaintiff, v. NELSON OIL COMPANY, a California corporation.	NO. 79 CV 694R JUDGMENT

This action came on for trial before the Court, Honorable Manuel L. Real presiding, and the issues having been duly tried and a decision and Findings of Fact and Conclusions of Law having been duly rendered,

[2] IT IS ORDERED AND ADJUDGED:

That the plaintiff Shell Oil Company recover of defendant Nelson Oil Company, Inc. the sum of $617,308.98, plus interest in the amount of 7% from the date of this judgment, plus its costs of this action;

That defendant Nelson Oil Company, Inc.'s annual gasoline allocation from Shell pursuant to Department of Energy regulations is hereby ordered reduced by 17,935,929 gallons;

That plaintiff Shell Oil Company has sufficient and proper grounds to

terminate the jobber franchise of defendant Nelson Oil Company, Inc. under the Petroleum Marketing Practices Act, upon the giving of notice as required by the Act; and

That defendant Nelson Oil Company, Inc. take nothing, and that its counterclaim against plaintiff Shell Oil Company be dismissed with prejudice.

Dated at Los Angeles, California, this 21st day of November, 1979.

/s/ MANUEL L. REAL
United States District Judge

Clerk of the Court

APPENDIX E

ORDER TO REMAND (28 U.S.C. 1447(c)), U. S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, (Hon. Robert Firth), NELSON OIL COMPANY, INC. v. SHELL OIL COMPANY, et al., CV 78-3790-RF, entered December 27, 1978;

and

ORDER PURSUANT TO RULE 60, U. S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, (Hon. Robert Firth), NELSON OIL COMPANY, INC. v. SHELL OIL COMPANY, CV 78-3790-RF, filed July 25, 1979

LODGED

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CLERK, U.S. DISTRICT COURT

CENTRAL DIST. OF CALIF.

FILED

DEC 27 1978

CLERK, U.S. DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BY DEPUTY

ENTERED

DEC 28 1978

CLERK, U.S. DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NELSON OIL COMPANY, INC., a California corporation, Plaintiff, -vs- SHELL OIL COMPANY, a Delaware corporation; CHARLES de BRETTEVILLE, individually; J. P. BOYD, individually; D. T. GALLAGHER, individually; R. W. SHERWOOD, individually; M. C. SILK, individually; DALE LINDSLEY, individually; and DOES 1 through 1000, inclusive, Defendants.	NO. 78 3790 RF (TX) ORDER TO REMAND (28 U.S.C. 1447 (c))

ORDER

Upon consideration of the pleadings filed in support of and in opposition to the motion to remand; the verified petition for removal; and oral argument at the hearing on the motion to remand:

[2] IT IS ORDERED that pursuant to 28 U.S.C. 1447(c), and upon the grounds set forth therein, the Motion to Remand is granted.

IT IS FURTHER ORDERED that pursuant to 28 U.S.C. 1447(c), a certified copy of this Order of Remand shall be mailed by the Clerk of this Court to the Clerk of the Superior Court in and for the County of Riverside, State of California, from which this action was removed.

IT IS FURTHER ORDERED that the Clerk shall mail a copy of this Order to counsel of record.

DATED: Dec 27 1978

/s/ ROBERT FIRTH
Judge, United States District Court

FILED

JUL 25 1979

CLERK, U. S. DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BY DEPUTY

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NELSON OIL COMPANY, INC., a California corporation, Plaintiff, vs. SHELL OIL COMPANY, a Delaware corporation, et al, Defendants.	No. CV 78-3790 RF (TX) ORDER PURSUANT TO RULE 60

IT IS HERLBY ORDERED, that the minute order dated December 14, 1978, and Order of Remand dated December 27, 1978, be corrected to show that the counterclaim of Shell Oil Company was remanded to the Superior Court in and for Riverside County, State of California, along with all other proceedings in this action.

Dated: JUL 25 1979

/s/ ROBERT FIRTH
ROBERT FIRTH
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX F

ORDER TO REMAND (28 U.S.C. 1447(c)), U. S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA (Hon. David Williams), NELSON OIL COMPANY, INC. v. SHELL OIL COMPANY, et al., CV 80-03184-DWW, filed August 19, 1980

FILED

AUG 19 1980

CLERK, U.S. DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BY DEPUTY

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NELSON OIL COMPANY, INC.	
Plaintiff,	No. 80-03184 (DWW)
v.	ORDER TO REMAND
SHELL OIL COMPANY, et al.,	(28 U.S.C. 1447(c))
Defendants.	

ORDER

Upon consideration of the pleadings filed in support of and in opposition to the motion to remand; the verified petition for removal; and oral argument at the hearing on the motion to remand:

[2] IT IS ORDERED that pursuant to 28 U.S.C. 1447 (c), and upon the grounds set forth therein, the Motion to Remand is granted.

IT IS FURTHER ORDERED that pursuant to 28 U.S.C. 1447 (c), a certified copy of this Order of Remand shall be mailed

by the Clerk of this Court to the Clerk of the Superior Court in and for the County of Los Angeles, State of California, from which this action was removed.

IT IS FURTHER ORDERED that the Clerk shall mail a copy of this Order to counsel of record.

DATED: 8/19/80 /s/ DAVID W. WILLIAMS
Judge, United States
District Court

APPENDIX G

ECONOMIC STABILIZATION ACT OF 1970,
12 U.S.C. §1904, note §§210, 211
[pertinent parts]

§210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus

whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: Provided, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such

person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

§211. Judicial review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount

in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code [chapter 89 of Title 28].

APPENDIX H

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, 15 U.S.C. §751 et seq. [pertinent parts]

§751. Findings and purpose

(a) The Congress hereby determines that --

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop planting and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce

and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive Branch of Government.

(b) The purpose of this Act [15 USCS §§751 et seq.] is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act [15 USCS §§751 et seq.] shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

§753. Mandatory allocation

(a) Regulation providing for mandatory allocation of crude oil, residual fuel oil, and refined petroleum products. Not later than fifteen days after the date of enactment of this Act [enacted Nov. 27, 1973], the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d), such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum pro-

ducts in or imported into the United States.

(b) Contents of regulation; price provisions; passthrough of increases; allocation to users of other fuels not obtainable. (1) The regulation under subsection (a), to the maximum extent practicable, shall provide for --

(A) protection of public health (including the production of pharmaceuticals), safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority,

and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to

refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of --

(i) fuels, and

(ii) minerals essential to the re-

quirements of the United States, and for required transportation related thereto.

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

* * *

(c)(3) The President shall, by order, require such adjustments in the allocations of crude oil, residual fuel oil, and refined petroleum products established under the regulation under subsection (a) as may reasonably be necessary (A) to accomplish the objectives of subsection (b), or (B) to prevent any person from taking any action which would be inconsistent with such objectives.

(4) The President may, by order, re-

quire such adjustments in the allocations of refined petroleum products and crude oil established under the regulation under subsection (a) as he determines may reasonably be necessary --

(A) in the case of refined petroleum products (i) to take into consideration market entry by branded independent marketers and non-branded independent marketers during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of marketing or distribution facilities of such marketers during or subsequent to calendar year 1972, and

(B) in the case of crude oil (i) to take into consideration market

entry by independent refiners and small refiners during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of refining facilities of such refiners during or subsequent to calendar year 1972.

Any adjustments made under this paragraph may be made only upon a finding that, to the maximum extent practicable, the objectives of subsection (b) of this section are attained.

§754

(b) The President may delegate all or any portion of the authority granted to him under this Act [15 USCS §§751 et seq.] to such officers, departments, or agencies of the United States, or to any State (or officer thereof), as he deems appropriate.

§760. Re-evaluation of regulation under §753(a)

(a) Not later than 60 days after the date of enactment of this section [enacted Dec. 22, 1975], the President shall give appropriate notice and afford interested persons an opportunity to present written and oral data, views, and arguments respecting the appropriateness of, or the continuing need for, the application of any provision of the regulation promulgated under section 4(a) [15 USC §753(a)] as such provision relates to the attainment of the objectives specified in section 4(b)(1) of section 4 [15 USC §753(b)(1)]. A transcript shall be kept of any such oral presentations of data, views, and argument.

(b) The President shall, after consi-

deration of such written and oral presentations and such other information as may be available to him --

(1) analyze such presentations and report thereon to the Congress within 120 days after the date of enactment of this section [enacted Dec. 22, 1975]; and

(2) shall promulgate, pursuant to the limitations and authority under section 12 [15 USCS §760a], such amendment, or amendments, to the regulation promulgated under section 4(a) [15 USCS §753(a)] as he determines are necessary or appropriate --

(A) to modify any provisions of such regulation in a manner which is consistent with the attainment, to the maximum extent practicable, of objectives specified in section

4(b)(1) [15 USCS §753(b)(1)]; or

(B) to eliminate any provisions of such regulation no longer necessary to provide for the attainment of such objectives.

APPENDIX I

28 U.S.C. §1447(d)

§1447. Procedure after removal generally

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

APPENDIX J

10 C.F.R. §211.13(f)

10 C.F.R. § 211.13(f): Adjustments to base period volume.

(f) Certifications and downward adjustments of base period uses. The chief executive officer (or his authorized agent) of a purchaser applying to a supplier for an adjustment under this section shall certify such application for accuracy. Such application shall contain a statement that increased allocations shall be used only for the purpose stated in the application, shall not be diverted for other uses; and that if its needs decline, the purchaser shall file an amended application for a downward adjustment to its base period use.

Supreme Court U. S.
FILED
OCT 31 1980
MICHAEL RODAK, JR., CLERK

No. 80-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NELSON OIL COMPANY, INC.,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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OPPOSITION OF RESPONDENT SHELL OIL CO. TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court was divested of subject matter jurisdiction over an exclusively federal cause of action for violation of Department of Energy regulations by the remand to state court of a separate and distinct action which included a counterclaim raising similar claims.

2. Whether both the district court and the Temporary Emergency Court of Appeals erred in interpreting and applying the plain language of 10 C.F.R. § 211.13(f), without deferring to the primary jurisdiction of the Department of Energy.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
JURISDICTION	1
STATEMENT	2
REASONS FOR DENYING THE PETITION	3
I. The District Court Properly Exercised Subject Matter Jurisdiction Over This Case	4
II. The District Court and TECA Correctly Applied the Plain Language of 10 C.F.R. § 211.13 (f) Without Deferring to the Primary Jurisdiction of DOE	5
CONCLUSION	6

TABLE OF CITATIONS

Cases:

Far East Conference v. *United States*, 342 U.S. 570 (1952)	6
Gully v. *First Nat. Bank in Meridian*, 299 U.S. 109 (1936)	5
United States v. *Western Pacific Railroad Co.*, 352 U.S. 59 (1956)	6

Statutes and Rules:

15 U.S.C. § 754(a)(1) (1976)	2, 4
12 U.S.C. § 1904 note (1976)	2

Regulations:

10 C.F.R. § 211.13(f) (1980)	2, 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-519

NELSON OIL COMPANY, INC.,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on July 21, 1980. (App. A.)[1] A petition for rehearing was denied on September 9, 1980. (App. B.) The petition for a writ of certiorari was re-

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[1] References to "App." indicate the Appendix to Petition for Writ of Certiorari. References to "Pet." are to the Petition for Writ of Certiorari.

ceived by respondent on October 7, 1980. The jurisdiction of this Court is invoked under 15 U.S.C. § 745(a)(1), incorporating 12 U.S.C. § 1904 note.

STATEMENT

Nelson is an independent jobber of Shell branded gasoline in Banning, California. In September, 1978, Nelson filed a lawsuit against Shell and others in California state court alleging unfair competition, fraud and deceit. Shell removed the case to federal court, on the grounds of diversity of citizenship, alleging fraudulent joinder of parties. Following removal, Shell filed an answer and counterclaim based on Nelson's violation of regulations of the Department of Energy and its predecessors ("DOE"), specifically 10 C.F.R. § 211.13(f) which forbids the diversion of allocated gasoline to customers not specified in DOE assignment orders. (App. J.)

On Nelson's motion, the United States District Court for the Central District of California (Firth, J.) remanded the case to state court on December 27, 1978. (App. L.)[2] Shell, on February 20, 1979, filed a new complaint in the United States District Court for the Central District of California, which set forth claims similar to those in the counterclaim, *i.e.*, that Nelson had violated 10 C.F.R. § 211.13(f).

After trial on the merits, the district court (Real, J.) found that Nelson had engaged in "willful and blatant violations" of 10 C.F.R. § 211.13(f) and entered judgment awarding Shell $617,308.90 in damages, reducing Nelson's annual gasoline allocation by 17,935,929 gallons

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[2] Seven months later, on July 25, 1979, the Court issued a second order pursuant to Rule 60, Fed. R. Civ. P., stating that Shell's federal counterclaim had been remanded to state court as part of the earlier remand order. (App. M.)

and declaring that Shell had proper grounds to terminate Nelson's franchise under the Petroleum Marketing Practices Act (15 U.S.C. §§ 2801 *et seq.*). (App. C & D.)[3] Nelson appealed to the Temporary Emergency Court of Appeals ("TECA"), which unanimously affirmed the district court judgment, finding that "Nelson was not using the [DOE] regulations; it was abusing them." (App. 30A-31A.)

REASONS FOR DENYING THE PETITION

The petition raises no question of substantial importance deserving of this Court's attention. The decision below does not announce any new or major rule of law. It does not conflict with any precedent of this Court or TECA or with any DOE regulations or statutes. Indeed, Congress has provided for appeals to TECA from all cases arising under DOE regulations, thereby insuring uniform appellate interpretation of said regulations by a court with substantial expertise with respect thereto.

The frivolous nature of the instant petition is graphically illustrated by the fact that the principal argument in the petition, that relating to the jurisdictional effect of the remand order (Pet. at 7-19), was *not* raised as a question for review before TECA, but was relegated to a passing footnote reference in Nelson's appellate brief. Nelson thus seeks to invoke this Court's review of an issue which its counsel before TECA (who are not counsel on the instant petition) did not think merited appellate review. The instant petition is a patent attempt to delay further execution of the district court's judgment, which has been stayed pending appeal, and should be dismissed out of hand.

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[3] Nelson's appeal of the franchise termination ruling to the Ninth Circuit Court of Appeals is presently pending.

I. The District Court Properly Exercised Subject Matter Jurisdiction Over This Case.

Section 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a)(1), incorporates Sections 209 through 211 of the Economic Stabilization Act of 1970. Section 210(a) of the Economic Stabilization Act provides for a private right of action to enforce DOE statutes and regulations. (App. 2G.) Since Shell's complaint alleged injury based on Nelson's violation of the DOE regulations contained in 10 C.F.R. § 211.13(f), the complaint clearly satisfied the jurisdictional prerequisites contained in § 210.

Nelson's principal contention is that the order remanding Nelson's unfair competition action (and Shell's counterclaim) ousted the district court's jurisdiction over Shell's subsequent complaint. Nelson's argument, however, disregards § 211(a) of the Economic Stabilization Act (App. 4G.), which provides that the district courts . . . shall have *exclusive original jurisdiction* of cases or controversies arising under this title, or under regulations or orders issued thereunder . . . . (Emphasis added.)

Therefore, under the express terms of the statute, Shell's counterclaim, as well as its subsequent complaint, were within the exclusive jurisdiction of the federal courts. Since the state court had no jurisdiction over the counterclaim after remand, Shell's only recourse was to refile its claims in federal court. Plainly, the remand order did not confer jurisdiction on a state court over a claim which Congress has stated is within the exclusive jurisdiction of the federal courts.[4] It was specifically for

---

[4] Contrary to Nelson's assertion, the district court in entering the remand order made no determination as to the appropriate forum for litigating Shell's claim of violation of the DOE regulations. It is well settled that, in deciding to remand a removed action, a district court may not consider matters raised by way of

this reason that TECA rejected Nelson's footnote argument:

> Nelson's argument that the district court did not have subject matter jurisdiction over Shell's claim because that claim was identical to the counterclaim remanded to the state court along with Nelson's unfair competition suit is wrong. Federal courts have exclusive jurisdiction over the claims raised by Shell [referring to prior footnote citing the Emergency Petroleum Allocation Act]. Because the state court is unable to consider Shell's counterclaim, it was appropriate for Shell to file an independent action in federal court following the remand in order to pursue its claim in the proper forum. (App. 16A.)

Nelson attempts to circumvent this unassailable conclusion with the frivolous argument that the state court had jurisdiction of Shell's counterclaim because § 211 of the Economic Stabilization Act provides for concurrent jurisdiction over DOE claims raised as a *defense* in a state action. The distinction between a defense, which is raised merely to defeat a plaintiff's cause of action, and a counterclaim, which seeks affirmative relief, is so well settled as to require no citation or further response to Nelson's contention.

II. The District Court and TECA Correctly Applied the Plain Language of 10 C.F.R. § 211.13(f) Without Deferring to the Primary Jurisdiction of DOE.

Both the district court and TECA rejected Nelson's attempt to invoke the doctrine of primary jurisdiction as a means of avoiding application of the plain language of 10 C.F.R. § 211.13(f) to its unlawful conduct.

---

defense or counterclaim. *Gully* v. *First Nat. Bank in Meridian*, 299 U.S. 109, 112-13 (1936).

It is well settled that "No fixed formula exists for applying the doctrine of primary jurisdiction." *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956). The application of primary jurisdiction depends on the circumstances of each case and whether the purpose behind the doctrine will be served by its application in that case. *Id.* Two major purposes of the doctrine have been identified: the need for the special expertise of the agency to decide technical questions and the interests of uniformity of regulation. *See, e.g., Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952). Thus, the doctrine is generally served only in those "cases raising issues of fact not within the conventional experience of judges . . . ." *Id.* at 574.

The district court and TECA applied these principles in this case. (App. 15A-19A.) The purposes of the primary jurisdiction doctrine would not be served in this case "since the regulations . . . were clear," "[t]here was no question as to the validity or reasonableness of the regulations," and "[a]pplication of the regulation did not require the specialized expertise of the agency." (App. 18A.)

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: October 31, 1980

MOTION FILED

No. 80-519

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NELSON OIL COMPANY, INC.,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

MOTION FOR LEAVE TO FILE AND BRIEF OF INDEPENDENT TERMINAL OPERATORS ASSOCIATION AS AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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NELSON OIL COMPANY, INC.,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

MOTION OF INDEPENDENT TERMINAL OPERATORS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Independent Terminal Operators Association ("ITOA") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the petition herein for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States. The consent of the petitioner herein has been obtained. The respondent herein has declined to consent to this motion.

ITOA is an organization of independent terminal operators which are non-branded independent marketers

of refined petroleum products. ITOA's members are vitally concerned with the proper enforcement, application and interpretation of the Emergency Petroleum Allocation Act, 15 U.S.C., *et seq.* ("EPAA") and related statutes.

As purchasers and resellers of motor gasoline, a product which is subject to the provisions of the Mandatory Petroleum Allocation Regulations, 10 C.F.R., Part 211, the members of ITOA have a strong interest in assuring effective and even-handed application of those regulations. The members of ITOA believe that the interpretation of the provisions of 10 C.F.R. §211.13(f) made by the courts below will have a substantial detriment to their right to be supplied with motor gasoline by major refiners, such as respondent. Thus, the members of ITOA have a direct and immediate interest in the outcome of this petition.

WHEREFORE, movant respectfully prays that this Court enter an order granting it leave to file its brief as *amicus curiae* in support of the petition for a writ of certiorari herein.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. The Courts Below Misinterpreted The Applicable Regulations 3

II. The Department of Energy Has Stated That Existing Regulations Do Not Impose A Downward Certification Requirement 7

CONCLUSION 10

APPENDIX

A. S. Comm. on Energy & Natural Resources, S. Rep. 95-731, 95th Cong., 1st Sess. 59 (1978) 1a

B. U.S. Department of Energy, Economic Regulatory Administration, *An Analysis of the Relative Competitive Position of Marketers of Motor Gasoline* 22 (1978) 5a

C. U.S. Department of Energy, Assistant Secretary for Policy Evaluation, *The State of Competition in Gasoline Marketing, Part I: The Effects of Refiner Operation at Retail* 20 (1980) 7a

TABLE OF AUTHORITIES

Cases:

Shell Oil Co., 3 DOE ¶81,059 (1979) 8

Texaco, Inc., 3 DOE ¶81,025 (1979) 6

Statutes:

15 U.S.C. §753(b)(1)(D), Energy Petroleum Allocation Act 10

Regulations:

10 C.F.R. §211 2

10 C.F.R. §211.9(a)(2)(i) 6

Regulations, continued: Page

10 C.F.R. §211.10(a)(1) 3
10 C.F.R. §211.10(b)(2)(i) 3
10 C.F.R. §211.11(c) 3
10 C.F.R. §211.11(d) 3
10 C.F.R. §211.12(a) 3
10 C.F.R. §211.13(c) 4, 5
10 C.F.R. §211.13(f) 2, 3, 4, 5, 6, 9, 10

Miscellaneous:

42 Fed. Reg. 20,826 (April 22, 1977) 7
44 Fed. Reg. 11,202 (February 28, 1979) 8
S. Comm. on Energy & Natural Resources, S. Rep. 95-731, 95th Cong., 1st Sess. 59 (1978) 8
U.S. Department of Energy, Economic Regulatory Administration, *An Analysis of the Relative Competitive Position of Marketers of Motor Gasoline* 22 (1978) 9
U.S. Department of Energy, Assistant Secretary for Policy Evaluation, *The State of Competition in Gasoline Marketing, Part I: The Effects of Refiner Operation at Retail* 20 (1980) 9

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BRIEF OF INDEPENDENT TERMINAL OPERATORS ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS

Independent Terminal Operators Association ("ITOA") is a trade association composed of independently owned terminal operators which purchase and resell petroleum products. The members of ITOA historically have been supplied at wholesale with products by major refiners and resold such products on a non-branded basis both to wholesale and retail purchasers and to consumers. As a result of the Mandatory Petroleum Allocation

Regulations, 10 C.F.R., Part 211, ("the Regulations") such supplier-purchaser relationships have been required to be maintained with respect to motor gasoline.

The members of ITOA are gravely concerned that the outcome of the decisions reached by the courts below will be to impose upon purchaser-resellers, such as themselves, a duty to downwardly adjust their allocation entitlements whenever their own customers decline to purchase product even though their supply obligations have not been terminated by the Department of Energy ("DOE"). The net effect of the decisions below is that Nelson's base period customers continue to have an entitlement to obtain supply from Nelson, but Nelson has been deprived of its own entitlement to receive product from Shell with which to satisfy Nelson's obligations to its own base period customers. The members of ITOA believe that such a result is contrary both to the letter and to the intent of the Regulations. Moreover, the members of ITOA believe that the responsibility for administering the Regulations and for balancing the various competing public and private interests involved rests with DOE, and that the courts are an inappropriate forum to terminate allocation rights and obligations.

SUMMARY OF ARGUMENT

The courts below misinterpreted the "downward" certification requirements of 10 C.F.R. §211.13(f) because that provision applies only in instances where a wholesale purchaser-reseller's obligations to its own customers have been terminated by DOE action. The effect of the decisions reached below could be to deprive wholesale purchaser-resellers of their supply entitlements without any dimunition in their obligations to supply their own customers. Moreover, the result reached by the

courts below is totally undermined by contemporaneous DOE pronouncements that there is no downward certification requirement in existing regulations.

ARGUMENT

I.

THE COURTS BELOW MISINTERPRETED THE APPLICABLE REGULATIONS

The Temporary Emergency Court of Appeals ("TECA") affirmed the district court's conclusion that 10 C.F.R. §211.13(f) imposed an obligation upon Nelson to "downward certify" its base period use from Shell merely by reason of the fact that Nelson's assigned customers did not purchase all of their supply entitlements from Nelson on a regular basis. (Appendix 20A-31A; 19C-20C). *Amicus* respectfully submits that the holding of the courts below was erroneous and that this Court ought to grant the petition for certiorari in order to correct such error.

The Regulations establish a series of supply obligations and purchase entitlements pursuant to which motor gasoline is allocated among various levels of distribution in the gasoline industry and ultimately to the consuming public. The Regulations require suppliers to allocate motor gasoline to purchasers to which they have a supply obligation, including purchasers which are assigned to them by DOE. 10 C.F.R. §211.10(a)(1) and (b)(2)(i). The Regulations establish certain purchase *rights* for purchasers, but impose no purchase *obligations*. 10 C.F.R. §211.12(a). The Regulations further provide that a purchaser may be deprived of its allocation entitlements only if such entitlements are transferred to a successor entity or if the purchaser goes out of business. 10 C.F.R. §211.11(c) and (d).

Nelson received from DOE a series of "assignments" obligating it to supply motor gasoline to certain new customers. Pursuant to the Regulations, Nelson submitted to Shell "upward" certifications of its allocation entitlements from Shell in order that Nelson could have supply entitlements to correspond to its supply obligations to such newly assigned customers. Pursuant to 10 C.F.R. §211.13(c), a wholesale purchaser-reseller's purchase of entitlements from its supplier may be increased in order to account for increases in the wholesale purchaser-reseller's supply obligations to its own customers. The purpose of this provision of the Regulations is to provide a mechanism by which wholesale purchaser-resellers can assure that new customers, the assignment of which results in an increase in the wholesale purchaser-reseller's obligations, will be able to receive an equitable volume of gasoline under the allocation program.

The pivotal question in this case is whether Nelson was required to "downward certify," or permanently reduce, its supply entitlement from Shell when its DOE-assigned customers failed to purchase their full supply entitlements in a given period of time. Pursuant to 10 C.F.R. §211.13(f), an applicant for an upward adjustment of its base period volume must file a statement "that if its needs decline, the purchaser shall file an amended application for a downward adjustment to its base period use." (Appendix 2J).

The term "needs" is not defined in the Regulations. However, the only rational interpretation of that term, and the interpretation consistently applied by DOE, is one that equates "needs" with supply *obligations*. However, the courts below held in effect that Nelson had a self-executing regulatory duty to make a permanent downward adjustment of its supply entitlements from

Shell merely by reason of the fact that Nelson's assigned customers did not purchase all of their base period entitlements from Nelson on a regular basis, notwithstanding the fact that Nelson remained under a continuing supply obligation to those customers. Such an interpretation is incompatible with the regulatory program, and if sustained would deprive wholesale purchaser-resellers and their assigned customers of the very protection which the regulations are designed to afford them.

The use of the term "needs" in Section 211.13(f) as synonomous with "supply obligation" reflects the requirements of a regulatory system in which (1) suppliers must make specified volumes of gasoline available to a particular customer upon that customer's demand; and (2) such customer has no obligation to purchase the volumes of gasoline to which it is entitled. If sustained, the interpretation reached by the courts below of the term "needs" as being synonymous with physical supply would eliminate the ability of a purchaser-reseller to fulfill its supply obligations.

The effect of the holding of the courts below is that a purchaser-reseller may be required to reduce its own entitlements on a permanent basis but is left with base period obligations to its own customers and no corresponding entitlement to purchase from its own supplier. This is true because of the fact that a demand by a customer that its supplier provide its supply entitlement is *not* one of the conditions which under Section 211.13(c) entitles that supplier to an upward adjustment. If a customer to which a supplier has a supply obligation but which has elected for a period of time not to exercise its purchase rights seeks to purchase its supply entitlement, the supplier is obligated to provide it. Thus, if a purchaser-resller were required to apply for a downward

adjustment whenever a customer to which it owes a supply obligation elects not to exercise its purchase rights for a period, it would be rendered incapable of fulfilling that supply obligation in the manner contemplated by the Regulations when that customer subsequently does exercise its purchase rights. Such a construction would yield an absurd result.

S :tion 211.13(f) must be interpreted to mean that a wholesale purchaser-reseller's "needs decline" only if its obligations to its own customers decline. These obligations decline only as a result of a termination or partial termination of the purchaser-reseller's base period supplier-purchaser relationship. These obligations are terminated neither by underlifting nor by consent, but only by affirmative action of DOE.

Indeed, the Regulations specifically provide that supplier-purchaser relationships may be terminated only upon express written approval of the DOE. 10 C.F.R. §211.9(a)(2)(i). Because so many public and individual interests are implicated by the creation and termination of such relationships, DOE must apply its specialized expertise in determining whether and under what conditions such relationships may be terminated. DOE will not terminate a supplier-purchaser relationship solely on the basis of the perceived equities as between a particular supplier and purchaser. Rather, the decision must be based upon due consideration of all of the underlying statutory and regulatory objectives involved. Such determinations cannot be made by the courts, but only by the agency which has the expertise to do so. *See Texaco, Inc.*, 3 DOE ¶81,025 (1979), where DOE declined a supplier's request to terminate a supplier-purchaser relationship, even though the purchaser had been guilty of fraud, on the grounds that to permit such a termination

would frustrate important regulatory objectives and impose hardships on all downstream purchasers.

Because the holdings of the courts below have the effect of terminating a substantial portion of a wholesale purchaser-reseller's base period entitlements, but completely disregard the impact and implications for all downstream purchasers to whom that purchaser-reseller continues to have a base period obligation, the result reached in this case will have a substantial adverse impact upon ITOA's members and their customers. For these reasons, *amicus* respectfully submits that the petition for a writ of certiorari should be granted.

II.

THE DEPARTMENT OF ENERGY HAS STATED THAT EXISTING REGULATIONS DO NOT IMPOSE A DOWNWARD CERTIFICATION REQUIREMENT

DOE and its predecessors have consistently recognized that a customer's non-use of its allocation entitlement ("underlifting") does *not* reduce or extinguish that customer's entitlements or its supplier's supply obligations. For example, in 1977, DOE's predecessor, the Federal Energy Administration ("FEA"), issued a proposal to amend the Regulations in order to provide for an "updated base period" and thus cause supplier base period obligations to reflect more current supply and demand patterns. 42 Fed. Reg. 20,826 (April 22, 1977). In so doing, FEA clearly recognized that, under the Regulations as they then existed, a supplier continued to have base period supply obligations and corresponding entitlements to obtain supply from its supplier, notwithstanding the fact that the purchasers to whom the supplier had base period supply obligations did not lift some or all of their entitlements. Subsequently, in 1979,

when DOE updated the motor gasoline allocation base period from the preexisting 1972 base period, it did so partially in recognition of the fact that previous base period obligations did not accurately reflect actual lifting patterns. 44 Fed. Reg. 11,202 (Feb. 28, 1979). Thus, DOE and its predecessors have recognized that "underlifting" by a purchaser does not, in itself, terminate the base period supply obligation of a supplier. Indeed, respondent Shell was granted temporary exception relief from its base period supply obligations in recognition of the fact that the Regulations did not provide for reduction in a supplier's obligations as a result of underlifting. *Shell Oil Co.*, 3 DOE ¶81,059 (1979).

This fact has been explicitly recognized by DOE in several instances. In a letter to Senator Henry M. Jackson, Chairman of the Senate Committee on Energy and Natural Resources, David J. Bardin, Administrator of DOE's Economic Regulatory Administration, stated:

> Since our regulations do not specifically require a decrease in allocation to the wholesale-reseller if a retail dealer goes out of business, the jobbers supplying retail outlets that have gone out of business are able to distribute an increased volume of gasoline among other customers and among retail outlets they operate.

S. Comm. on Energy & Natural Resources, S. Rep. 95-731, 95th Cong., 1st Sess. 59 (1978) (Appendix A hereto, at 1a). At the same time, DOE's Office of Fuels Regulation of the Economic Regulatory Administration stated:

> Present DOE regulations require prior suppliers to make an additional assignment of gasoline to a wholesale-reseller whenever an allocation for a retail outlet is approved. Since there is no require-

> ment for a decrease in allocation if the wholesale-reseller supplied retail dealer goes out of business, the wholesale-resellers using retail outlets have been able to redistribute an increased volume of gasoline among their customers and also among their own retail outlets.

U.S. Department of Energy, Economic Regulatory Administration, *An Analysis of the Relative Competitive Position of Marketers of Motor Gasoline* 22 (1978) (Appendix B hereto, at 5a).

More recently, DOE's Office of Competition stated:

> Suppliers receiving assignments of new accounts (including jobbers who serve as "willing suppliers" for new outlets they own themselves) may upwardly certify those additonal volumes to their supplier for an adjustment of their own base-period volumes. There is no corresponding downward certification requirement when an outlet goes out of business; however, a marketer is required to distribute a closed outlet's volumes to all of its other customers and offer surplus product to existing purchasers before other disposition is made of the product.

U.S. Department of Energy, Assistant Secretary for Policy Evaluation, *The State of Competition In Gasoline Marketing, Part I: The Effects of Refiner Operation at Retail* 20 (1980) (Appendix C hereto, at 7a).

Since DOE has so frequently stated that there is no requirement of downward certification, the interpretation of Section 211.13(f) made by the courts below is completely unsupportable. The result could be highly deleterious to the Congressionally-mandated directive that the Regulations provide, "to the maximum extent practicable," for the "preservation of an economically sound and competitive petroleum industry . . . and to

preserve the competitive viability of . . . nonbranded independent marketers." 15 U.S.C. §753(b)(1)(D). Moreover, Congress has granted to DOE and its predecessors discretion to fashion the allocation program and modifications thereto and to make particular exceptions from its requirements. DOE has consistently held that there is no requirement of downward certification. Yet the courts below have interpreted Section 211.13(f) in a manner so as to impose such a requirement. Such a result is potentially chaotic and is directly contrary to that intended by Congress when it enacted the statutory framework requiring the allocation of motor gasoline. For these reasons as well, *amicus* respectfully prays that the petition for a writ of certiorari be granted.

CONCLUSION

Amicus respectfully prays that the petiton for a writ of certiorari be granted and that the judgment below be reversed.

Respectfully submitted,

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November 3, 1980

By: _____

APPENDIX A

SENATE

Calendar No. 670

95th Congress - 2d Session

Report No. 95-731

PETROLEUM MARKETING PRACTICES ACT

April 10 (legislative day, February 6), 1978. – Ordered to be printed

Mr. Jackson, from the Committee on Energy and Natural Resources, submitted the following

REPORT

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany H.R. 130]

* * *

[59]

Department of Energy,
Washington, D.C., March 20, 1978

Hon. Henry M. Jackson,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: In response to concerns expressed by Senator Haskell in conversations with the Federal Energy Administration's (FEA) Administrator John F. O'Leary concerning conditions in the gasoline marketplace, the staff of the FEA undertook to develop an analysis of the relative competitive position of the various categories of motor gasoline marketers. We have completed this analysis and I am providing you a copy of the staff study that was prepared for your use.

Our staff study was unable to address fully the market shares of the various marketing groups due to a lack of requisite data regarding the wholesale-reseller level of marketing. The data elements that we have been collecting up to now are designed to enable us to monitor and analyze the sale of gasoline by refiners and by retailers. The data are not sufficiently comprehensive to enable us to analyze the sale of gasoline at the wholesale-reseller level. As the staff study indicates, this category of marketers has recently increased its marketing activity.

The study, based primarily on sales volume data, indicates that there have been some shifts in the market shares of the various marketing segments over the past several years. The reasons for these shifts are not disclosed by the available data. The relative competitive viability of the marketing sectors can likewise not be ascertained from available data. In general, the shifts appear to be resulting from market forces operating in the context of the existing regulatory framework, as well as from certain aspects of the regulations.

For example, in conducting this analysis we determined that a provision of our regulations may be contributing to certain anomalies in the gasoline marketplace. Our regulations require prime suppliers to make additional assignments of gasoline to a wholesale-reseller whenever an allocation for a retail outlet is approved. Since our regulations do not specifically require a decrease in allocation to the wholesale-reseller if a retail dealer goes out of business, the jobbers supplying retail outlets that have gone out of business are able to distribute an increased volume of gasoline among other customers and among retail outlets they operate.

I particularly call your attention to the following points contained in the Executive Summary of the analy-

sis, which may be helpful in your further consideration of "dealer day in court" legislation.

The volume of gasoline sold by all (major and non-major) refiners to their open and lessee retail dealers declined 11 percent from 1972 to 1976, while refiners increased their sales to all other classes of gasoline marketers.

The volume of gasoline sold by all refiners through their salaried retail outlets increased by 69 percent from 1972 to 1976.

[60] The volume of gasoline sold by small refiners (those with refining capacities under 175,000 barrels per day) through their salaried retail outlets increased by 86 percent from 1972 to 1976.

The number of salaried retail outlets of refiners with capacities in excess of 100,000 barrels per day increased by 27 percent from 1974 to 1976, with five of those refiners increasing the number of their salaried retail outlets by 70 percent over those 2 years.

A further analysis of motor gasoline marketing is contained in the FEA's Findings and Views Concerning the Exemption of Motor Gasoline From the Mandatory Petroleum Allocation and Price Regulations (September 1977), a copy of which is also enclosed. That analysis concluded competition and market forces would adequately protect consumers following the proposed decontrol of gasoline and that the positive effects of increased competition would also facilitate the preservation of an economically sound and competitive petroleum industry.

I would be pleased to discuss these analyses with you or have my staff meet with yours to discuss our findings in more detail.

Sincerely,

David J. Bardin,
Administrator,
Economic Regulatory Administration.

Enclosures.

APPENDIX B

An Analysis of the Relative Competitive Position of Marketers of Motor Gasoline

U.S. Department of Energy
Economic Regulatory Administration
Office of Fuels Regulation

MARCH, 1978

* * *

[22] Present DOE regulations require prime suppliers to make an additional assignment of gasoline to a wholesale-reseller whenever an allocation for a retail outlet is approved. Since there is no requirement for a decrease in allocation if the wholesale-reseller supplied retail dealer goes out of business, the wholesale-resellers losing retail outlets have been able to redistribute an increased volume of gasoline among their customers and also among their own retail outlets. The branded independent dealers allege that this redistribution of gasoline by the wholesale-resellers places them in an unfair competitive position when competing at the retail level. This "upward certification" provision of the regulations may have created some market share distortions.

* * *

APPENDIX C

DOE/PE-0019
Vol. 1 (of 3 Volumes)

Part I
The State of Competition in Gasoline Marketing

The Effects of Refiner Operation at Retail (A Study Required by Title III of the Petroleum Marketing Practices Act)

Published May 1980

U.S. Department of Energy
Assistant Secretary for Policy and Evaluation
Office of Competition
Washington, D.C. 20585

Part I
The State of Competition in Gasoline Marketing

The Effects of Refiner Operation at Retail (A Study Required by Title III of the Petroleum Marketing Practices Act)

Published May 1980

Prepared by:
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Under the Direction of:
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U.S. Department of Energy
Assistant Secretary for Policy and Evaluation
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Washington, D.C. 20585

* * *

[20] Suppliers receiving assignments of new accounts (including jobbers who serve as "willing suppliers" for new outlets they own themselves) may upwardly certify those additional volumes to their supplier for an adjustment of their own base-period volumes.[4] There is no corresponding downward certification requirement when an outlet goes out of business; however, a marketer is required to distribute a closed outlet's volumes to all of its other customers and offer surplus product to existing purchasers before other disposition is made of the product.[5] (DOE has proposed amendments to the allocation regulations which, if adopted, would require some form of downward certification either upon station closings or at the time a firm upward certifies additional volumes.[6] To date, no final rule has been adopted.)

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[4] 10 C.F.R. Sections 211.13 and 211.105.

[5] 10 C.F.R. Section 211.106, Subpart A generally, and 10 C.F.R. Section 211.10(f) and (g)(5).

[6] 44 F.R. 69962 (December 5, 1979).

* * *